Supreme Court, U.S.
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92-435

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ARCHVIEW INVESTMENTS, INC., an Illinois corporation,

Petitioner,

vs.

CITY OF COLLINSVILLE, ILLINOIS, a Municipal Corporation; THE HONORABLE GENE J. BROMBOLICH, Mayor of the City of Collinsville; LOUIS JACKSTADT, City Clerk of the City of Collinsville; MELVIN HEINECKE, Zoning Administrator of the City of Collinsville; ROBERT L. DESPAIN, WILLIAM F. GIGLOTTO, GARY KLEIN, MELVIN P. PAMATOT, Collectively Councilmen Comprising the City Council of the City of Collinsville, Illinois,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Municipal Corporation and its Individual Officials acts can be surmised as arbitrary and capricious in depriving the Petitioner of its Constitutional Rights in violation of 42 U.S.C.A. §1983 when they expressed an aversion to abortion and used it is as a factor in denying the Petitioner a right to a building permit even though their primary purpose in denying a building permit to Petitioner was alleged noncompliance of Building Officials Conference of America Code(BOCA) Requirements without evidence to support the allegations of non-compliance at Petitioner's review hearing.

2. Whether a Municipal Corporation and its Individual Officials deprived the Petitioner of **"Due Process"** by upholding in review hearing as supporting reasons for denial of Petitioner's application for a

building permit reasons which Petitioner was not apprised of or aware of prior to the review hearing.

3. Whether Administrative Review Hearings by an Administrative Body is to be a Hearing de Novo.

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TO: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

PRAYER

The Petitioner, **Archview Investments, Inc.**, Plaintiff-Appellant in the Court below, respectfully prays that a Writ of Certiorari issue to review the Opinion of the Illinois Supreme Court which refused to grant leave to appeal from the Opinion of the Appellate Court of Illinois(Fifth District) entered in this case.

OPINION BELOW

The Illinois Supreme Court on June 3, 1992, denied the Petitioner's, Archview Investments, Inc.'s, Petition for Leave to Appeal from the judgment of the Appellate Court of Illinois(Fifth District) which denied Petitioner's Petition for Rehearing on January 21, 1992 and prior to that, it affirmed on December 12, 1991, a judgment entered in the Circuit Court of Madison County, Illinois, on July 12, 1989, in favor of Respondents-

Appellees-Defendants and against Petitioner-Appellant-Plaintiff. The Appellate Court of Illinois(Fifth District) affirmance entered on December 12, 1991 was reported at 165 Ill. Dec. 387 or 584 N.E. 2d 821 and is reproduced hereto as Appendix B.

STATUTES

28 U.S.C.A. §1257(a):

"(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

42 U.S.C.A. §1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

PARTIES TO THIS PROCEEDING

The caption of this case in this Court contains the names of all parties.

JURISDICTION

The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal from the prior Opinion and Judgment of the Appellate Court of Illinois(Fifth District) on June 3, 1992. This Petition is filed within ninety(90) days thereafter. The jurisdiction of this Honorable Court is invoked under Title 28 U.S.C.A. §1257(a).

STATEMENT OF THE CASE

The Proceedings Below.

This Petition for Writ of Certiorari arises from the denial of a building permit by

Mayor Gene J. Brombolich on behalf of the City of Collinsville, and various officials of that City, to the Petitioner-Appellant-Plaintiff, Archview Investments, Inc. The initial denial by Mayor Brombolich was issued on March 23, 1981. Following this initial denial, an appeal was taken to the City Council of Collinsville, Illinois and as a result of the review hearing which was held on July 20, 1981, they upheld the decision of the Mayor to deny the Petitioner-Appellant-Plaintiff's application for a building permit. Subsequent to this, then, the Petitioner-Appellant-Plaintiff filed a complaint in the Circuit Court of Madison County, Illinois.

Count I of that complaint sought the issuance of a Writ of Mandamus against the officials compelling them to issue the permit. Count II sought the invalidation of various ordinances of the City of Collinsville. Count

III requested administrative review of the decision of the City Council of the City of Collinsville in upholding the denial of the building permit by the Mayor.

Count IV sought compensatory and punitive damages against the City of Collinsville for violation of constitutional rights under Section 1983 (42 U.S.C.A. §1983). Count V of the complaint sought compensatory and punitive damages against the officials involved for the denial of the permit and their actions in the subsequent appeal.

A trial was heard on the Complaint in the Circuit Court of Madison County, Illinois before the Honorable Lola P. Maddox on April 18, 1988 through April 20, 1988. Thereafter, the issues of fact and law were extensively briefed to the Court. On July 12, 1989, the Court entered a judgment finding in favor of the Respondents-Appellees-Defendants on all

counts. It is from this judgment that the Petitioner-Appellant-Plaintiff, Archview Investments, Inc., appealed to the Appellate Court of Illinois(Fifth District) which subsequently affirmed the judgment of the Circuit Court of Madison County, Illinois on December 12, 1991 and denied a Petition for Rehearing on January 21, 1992. Thereafter, the Petitioner-Appellant-Plaintiff, Archview Investments, Inc., sought leave to appeal the Appellate Court of Illinois(Fifth District) opinion and order to the Illinois Supreme Court who refused to hear the appeal on June 3, 1992.

STATEMENT OF FACTS

Dr. Bolivar Escobedo applied for a building permit on October 21, 1980. This application was never heard from again. The building plans for the proposed construction were also submitted along with the

application.

Melvin Heinecke testified at trial that he was the Building Inspector and Zoning Administrator at the time the application was submitted. (App. 24). After determining that the building was in a correct zoning area, he brought this application to the Mayor. (App. 25). At that time, the Mayor instructed him not to issue the building permit and to put it in a cabinet and leave it there. No reason was given for this action, nor was any defect found in the application. (App. 25, 26, 28-29).

On March 10, 1981, the Petitioner-Appellant-Plaintiff, Archview Investments, Inc., submitted an application for a building permit for the same building at the same location. Subsequent to the original application, the property was transferred to Archview Investments, Inc., a wholly owned

corporation of Dr. Escobedo. At trial, Mr. Heinecke testified that he knew the zoning was correct for this second application and saw no reason for the denial of the permit. Again, the application was brought before the Mayor, whose only inquiry concerning the application concerned the difference of the name on the application (App. 26-27).

At that point, the Mayor instructed Mr. Heinecke not to issue the permit, giving no reason for the denial. Mr. Heinecke testified that he did not give the Mayor any reasons for denying the application. Mr. Heinecke contacted no one else, neither the owner, architect, or the contractor (App. 27). This was in contravention to the normal practice of his office, which would be to identify areas of non-compliance on the permit and thereafter to contact the owner, architect, or contractor to obtain compliance. (App. 28). During his

discussion with the Mayor, the Mayor did not ask if the application complied with the requirements of the ordinances of the City of Collinsville, nor did the Mayor express any defects he observed in the plaintiff's application. (App. 28-29).

Mr. Heinecke further testified that there was nothing different from the plans submitted in this case than from those of any other Doctor's medical building that he had seen during the course of his employment. In fact, he had previously approved a doctor's office building for a Dr. Rallo, and there was no difference between what Dr. Rallo was proposing to do in the way of his plans and the building proposed in this case. (App. 29).

On March 23, 1981, Mayor Brombolich wrote a letter to Archview Investments, Inc. denying the building application. (App. 46-47). The

conclusion of that letter from Mayor Brombolich stated: "if in fact the building is to be used for an abortion clinic, it would be contrary to the general health, safety, and welfare of the public to issue the building permit." The letter also stated: "as Mayor of the City, I feel that it is not in the best interest of the City to issue the permit."

Following the receipt of this correspondence, plaintiff filed an appeal with the Zoning Board of Appeals. However, after advise from the City attorney that zoning was not the issue, the appeal was transferred to the City Council. This transfer was made with the agreement of the city attorney, Dwight Taylor, that any time limits would be waived.

As indicated by counsel for Petitioner-Appellant-Plaintiff at the appeal hearing before the City Council, the case was brought before the Zoning Board of Appeals, rather

than the City Council due to the ambiguous nature of the denial letter. As the denial letter sought to raise issues concerning health, safety, and welfare of the city, counsel for plaintiff interpreted such statements to indicate that the denial was based on the particular use in that particular area, thus raising a zoning question.

This belief was supported by the fact that no specific statement of non-compliance with any City ordinance for building permits was cited in the denial letter. Counsel for plaintiff, Gary Apoian, subsequently testified at trial that any timeliness issue was waived by the Corporate Counsel, Dwight Taylor (App. 37-38).

On July 20, 1981, a hearing was held before the City Council on the appeal of the plaintiff. The City Council is composed of five (5) members; defendants Brombolich,

Pamatot, Giglotto, Klein and DesPain. During the course of the hearing, the only issue addressed by any member of the City Council was whether or not Dr. Escobedo would perform abortions if the facility was allowed to be built in Collinsville.

Mayor Brombolich questioned Counsel Apoian and Dr. Escobedo extensively concerning the intended purpose of the building. The Mayor blatantly inquired as to whether or not Dr. Escobedo proposed to perform abortions in this medical building. Other members of the Council, by their questioning, expressed their concern that Dr. Escobedo would move his present operation from Missouri to the proposed Collinsville building.

Based on the final motion, this appeal was supposed to deal with the issue of compliance with the ordinances of the City of Collinsville and the requirements of BOCA. In

support of the reversal of the Mayor's decision, the Petitioner-Appellant-Plaintiff presented the testimony of M. Thomas Hall, the architect for Archview Investments, Inc. He testified that the Petitioner-Appellant-Plaintiff followed standard procedure in the process of gaining zoning, building code information, and obtaining the criteria necessary for a proper design, both from the City's point of view and the client's point of view. He researched the necessary zoning requirements, zoning code requirements, fire district requirements, and designed the proposed building to conform with those requirements.

Mr. Hall further testified that the proposed plans were consistent with the BOCA provisions and other requirements of the city ordinances. He also indicated that, consistent with the testimony of Mr. Heinecke,

no contact was made from the City to advise that the architectural or structural plans were not in compliance with BOCA provisions. (App. 38-41).

Although Mr. Heinecke, Building Inspector and Zoning Administrator, was present at this hearing, he was not called to testify concerning the compliance of the application with city ordinances or the BOCA provisions. Indeed, the only statement Mr. Heinecke made during the hearing concerned the issue of waste disposal, wherein he indicated there was nothing unusual concerning the application, and that the application was "like any other medical building that was built." Therefore, the testimony of the architect, Mr. Hall, concerning compliance, was uncontroverted by the Mayor or the Building Inspector during the course of this hearing before the City Council.

At the conclusion of the hearing, Commissioner Pamatot, read from a type written, pre-prepared statement as follows:

"I move to concur with the position of the mayor and deny building permit to Archview Investments, Inc., on the following grounds:

1. Appeal is not filed in compliance with the requirements of Section 16.20.010 of the Collinsville Municipal Code.

2. It is contrary to the general health, safety, and welfare of the public in the following respects:

a) Cause traffic problems;
b) Cause parking problems;
c) Cause crowd control problems;
d) Create a public nuisance;
e) Is contrary to public policy of this city.

3. Applicant failed to comply with the requirements of BOCA Basic Building Code\1981 Section 111.2; 111.3; 111.4; 111.5; 111.6; 111.7.

A roll call vote was taken on this motion which passed unanimously. As indicated, the plaintiff brought suit on this denial and the actions of the individual officials of the City in the Circuit Court of Madison County,

Illinois. The trial court(Circuit Court of Madison County, Illinois) eventually held against the Petitioner-Appellant-Plaintiff on all counts.

In the extensive opinion of the Court, two underlying determinations were recurrent to support the decision of the Court in holding against the Petitioner-Appellant-Plaintiff. First is the Court's determination of the timeliness of the appeal. Second is the Court's determination of non-compliance of the application with the BOCA provisions, specifically 111.2 through 111.7. (Court Judgment).

As indicated above, the Building Inspector, Melvin Heinecke, did not testify before the City Council on the issues of compliance with the BOCA provisions. However, at trial, he testified specifically as to each of the alleged violations. BOCA Section 111.2

concerns the payment of certain fees. Mr. Heinecke indicated at trial that these fees were customarily not paid until after the permit was issued. (App. 30).

BOCA Section 111.3 concerns a requirement that the application be signed. Mr. Heinecke testified at trial that the City of Collinsville had never required this of any application and had never denied any application based on non-signature of the application. (App. 30).

BOCA Section 111.4 concerns the question of the sufficiency of the application as to the description and detail of the plans. At trial, Mr. Heinecke indicated that these types of applications had previously been received by the City and the City had always issued permits. He further testified that the description concerning the intended use of the property was as detailed as set forth in other

applications, and that the City had never required any greater description from any other application. (App. 30-31).

BOCA Section 111.5 concerns the sufficiency of the specifications and plans for the building specifically relating to the specifications for the electrical and plumbing outlines. At trial, Mr. Heinecke testified that these requirements would not be necessary for a "shell building". Also, he reiterated that the normal procedure would have been to contact the architect or owner or contractor to obtain additional detail if necessary to meet compliance. In this case, however, Mr. Heinecke testified that the Mayor instructed him to bury the application. This action was taken before Mr. Heinecke had even figured out that there was any detail missing from this application. (App. 32).

BOCA Section 111.6 concerns the front set

backs and side set backs. However, Mr. Heinecke testified at trial that the submitted plans were to scale and that the front and side set backs could easily be calculated with a scale and ruler. In fact, Mr. Heinecke indicated that he had done such calculation and that the rejection of the application was not related to the amount of set back. (App. 32-33).

BOCA Section 111.7 indicates that the building official may require adequate details of the structural, mechanical, and electrical work to be filed. At trial, Mr. Heinecke testified that such a requirement would be inapplicable to a shell building and that no attempt was made to contact either the owner, architect, or contractor to obtain specific information concerning compliance with this section. (App. 33-34). Although, there was other testimony at trial concerning the issue

of compliance, the testimony of Mr. Heinecke was by the City Official, specifically empowered and authorized by the ordinances of the City of Collinsville to decide the issue of compliance with the ordinances and the BOCA provisions.

ARGUMENT

1. DEPRIVATION OF CONSTITUTIONAL RIGHTS, IN VIOLATION OF 42 U.S.C.A §1983.

In Counts IV and V of Petitioner's Second Amended Complaint in the Circuit Court of Madison County, Illinois, Petitioner sought recovery against the City of Collinsville, and the individual City Council members for the deprivation of constitutional rights in contravention of 42 U.S.C.A §1983. In addressing this issue, the Appellate Court of Illinois(Fifth District) concluded that the City's actions could only be considered as unconstitutional had the Petitioner abided by

the BOCA Code requirements. In support of this analysis, the Appellate Court of Illinois(Fifth District) relied on Davis v. City of Chicago (1974), 59 Ill.2d 439, 322 N.E.2d 29; People v. Fleming (1971), 50 Ill.2d 141, 277 N.E.2d 872; see Ashwander v. Tennessee Valley Authority (1936), 297 U.S. 288, 80 L.Ed. 688, 56 S.Ct. 466 (Brandeis, J., concurring); Cochenour v. Cochenour (8th Cir. 1989), 888 F.2d 1244; Espino v. Besteiro (5th Cir. 1983), 708 F.2d 1002, which all basically held that a constitutional issue will not be considered unless it is material to deciding the case. However, the Appellate Court of Illinois(Fifth District)'s final determination that the Petitioner had failed to show that it had satisfied all of the requirements for the building permit, namely, compliance with the BOCA Code Requirements mandated not reaching any discussion of any constitutional

improprieties on the part of the Respondents.

Municipal liability under Section 1983 occurs when official policies cause City employees to violate another person's constitutional rights. It is when execution of a government's policy or custom, whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government, as an entity, is responsible under § 1983. Carr v. Town of Dewey Beach, 730 F. Supp. 591, 605 (D. Del. 1990); citing City of St. Louis v. Prapotnik, 485 U.S. 112, 122, 108 S. Ct. 915, 923 (1988).

Accordingly, a municipality incurs § 1983 liability when its employees acting pursuant to an official "policy" or "custom" violate a person's constitutional rights. Carr, supra at 605. Such municipal policy may be inferred from a "single decision taken by the highest

officials responsible for setting policy in that area of the government's business." Carr, supra at 606.

It is generally well established that a due process claim under § 1983 is established in the context of building permits or land use permits after a showing of arbitrary, capricious, or illegal denial of such permits by the governmental entity or individuals involved. Littlefield v. City of Afton, 785 F. 2d 596 (8th Cir. 1986); Scudder v. Town of Greendale, 704 F. 2d 999, 1002 (7th Cir. 1983). Examples of such arbitrary and capricious actions include: the imposition of conditions not required by statute or the denial of permits or licenses because of direct pecuniary interest on the part of the municipal defendants. Wilkerson v. Johnson, 699 F. 2d 325, 328 (6th Cir. 1983); acting in derogation of a municipal council's regular

practice of non-involvement in permit issuance, Scott v. Greenville County, 716 F. 2d 1418, 1421 (4th Cir. 1980); the imposition of unconstitutional conditions on the granting of a permit; Littlefield, supra at 607; and the imposition of requirement, not included in the ordinance, upon applicant for a permit when the defendant had an administrative, non-discretionary duty to approve the proposed plat upon the property owners compliance with the regulation. Southern Cooperative Development Fund v. Driggers, 696 F. 2d 1347, 1356 (11th Cir. 1983).

A particularly worthy discussion on the issue of arbitrary and capricious action is found in Bello v. Walker, 840 F. 2d 1124 (3rd Cir. 1988). In Bello, the plaintiffs were denied a permit to build phase four of their proposed development by the municipalities "Code Enforcement Officer" ostensibly, because

the order of construction deviated from the original proposal. In addressing the §1983 allegations of substantive due process violation, the Third Circuit Court of Appeals held that the "deliberate and arbitrary abuse of government power violates an individual's rights to substantive due process." The Court's analysis is quite relevant to the case at bar. Therein, the Court stated that:

> "We need not define, at this juncture, the outer limits of the showing necessary to demonstrate that a governmental action was arbitrary, irrational, or tainted by improper motive. The plaintiffs in the case presented evidence from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of a municipality properly interfered with the process by which the municipality issued building permits, and that they did so for partisan, political or personal reasons unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and are sufficient to establish a substantive due process violation actionable under § 1983. Bello, Supra at 112. See also Bateson vs. Geisse, 857 F. 2d 1300 (9th Cir. 1988).

With this case authority in mind, the

decision of the Appellate Court of Illinois(Fifth District) should be reversed. As indicated above, the Appellate Court of Illinois(Fifth District)'s analysis was essentially that even though the City policy and motives of the Council members expressed an aversion to abortion and it admittedly played a role in the decision to deny Petitioner the building permit, the action of the Council and the individual members was not violative of § 1983, because the denial of the permit would have resulted, thus eliminating the need to determine the constitutionality of the improper motive (abortion). The basis for this determination was the alleged non-compliance of the permit by virtue of the BOCA Code violations.

This determination is contrary to a proper analysis of a § 1983 case. This Honorable Court should view whether the policy

of the City resulted in the infringement of constitutional rights, or whether the Respondents acted arbitrarily and capriciously in reaching their decision. A review of the sequential events of this circumstance indicates that the Respondents acted arbitrarily and capriciously in this matter.

The uncontroverted testimony at the Circuit Court of Madison County, Illinois trial was that the Mayor, upon receipt of the first application by Dr. Escobedo, promptly instructed the building inspector to "bury" the application. No reason was given for this action nor was any deficit noted in the application. Upon receipt of the second application from Dr. Escobedo's wholly owned corporation, Archview Investments, Inc., the Petitioner, the Mayor undertook the same action to "bury" the application and plans. No statement was given of any defect or any

non-compliance with the city ordinances. The Building Inspector was simply instructed to kill the permit and take no action on it.

The alleged violations of the BOCA Code did not come into play until substantially after the decision had been made to deny the application. It was only in retrospect, in an effort to find support for a decision which had already been made, that the Mayor had the Building Inspector scrutinize the application and find the alleged technical non-compliance. Clearly, at this point in the process, the Mayor is liable under § 1983 for his intentional, arbitrary and capricious actions in denying the permit without any basis whatsoever for such action, other than the impermissible personal aversion to the concept of abortion.

As to the actions of the City Council, while the final motion dealt with violations

of the BOCA Code and the timeliness of the appeal, any objective reading of the transcript of that hearing of July 20, 1981, indicates that compliance with the ordinances of the City of Collinsville was not the primary motive for the decision of the Council. These alleged violations were merely found to support a decision which was made well in advance of this hearing in review of the denial of the application. This is clearly evident from the fact that the councilmen making the motion read from a type-written, prepared statement.

The Council also acted arbitrarily and capricious in finding that the application did not comply with the City ordinances. As indicated above, the only testimony presented to the Council during the hearing on review was from the architect of the Petitioner, who testified that the permit was completely in

compliance with the ordinances and BOCA provisions. No evidence was presented to support the allegations of non-compliance.

The perfect witness, the Building Inspector, Melvin Heinecke, was present, but offered no evidence to support the Mayor's denial of the application. When Mr. Heinecke eventually testified at trial concerning the alleged violations of the BOCA Code, it is clear that there was either no violation or violations which would normally and customarily have been resolved through contact with the owner, architect, or contractor. Therefore, if there were technical violations of the BOCA Code, such non-compliance could easily have been remedied if the Respondents had followed their normal and customary procedures, rather than instructing the Building Inspector to bury the application and take no further action.

It is particularly relevant to note, that the City Council in this case was performing an administerial, non-discretionary action. If the evidence presented at the hearing on review showed compliance, the City Council was under a duty to issue the permit. As set forth above, and based on the review of the record of that hearing, it is clear that the members of the Council were seeking to impose their own personal aversion to the concept of abortion for either personal or political reasons.

Additionally, it is clear that the Council was acting to obtain information which was unnecessary for the administerial determination of the application through their inquisition of Dr. Escobedo concerning his intentions for the use of this medical buildings. It is clear from the testimony of Mr. Heinecke that other medical building did

not meet with this resistance, and were routinely approved. Accordingly, it is clear that the Council and the Mayor acted arbitrarily and capriciously in their denial of the application, both initially, and upon review.

It should be noted that the other issues raised in the motion to concur with the Mayoral denial of the application are not relevant to the discussion of violation of § 1983. The timeliness issue of the appeal is irrelevant, as by the time that issue was raised, the Petitioner had already suffered serious deprivation of it's constitutional rights, as a result of the Mayor's unreasonable denial in it's application. The issues raised concerning general health, welfare, and safety are issues which are appropriate to a zoning question, but which have no play in the conforming or non-

conformity of the application with the ordinances of the City of Collinsville or the BOCA provisions. Thus, the reasonableness of the actions of the City Council must stand or fall on the basis of the compliance issue concerning the BOCA regulations.

2. DUE PROCESS RIGHTS VIOLATED

Basic to the concept of due process is the right to know what one is charged with prior to a hearing so that a proper and meaningful defense can be prepared. This Honorable Court has, in the past, defined a specific requirement of due process by stating in Mullane v. Central Hanover Bank & Trust Co., et al. (1950), 339 U.S. 306, 70 S.Ct. 652, 657 the following:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

objections."

Furthermore, it is academic that a notice is adequate under the due process clause if it apprises the affected individual of, and permits adequate preparation for, the impending hearing. Chicago Cable Comm. v. Chicago Cable Com'n, 678 F. Supp. 734 (N.D. Ill. 1988). Whitfield v. Simpson, 312 F. Supp. 889 (N.D. Ill. 1970). This Honorable Court should grant this Petition for Writ of Certiorari because the Illinois Supreme Court's refusal to hear this matter, as currently written by the Appellate Court of Illinois(Fifth District), denies this Petitioner its right to due process in this regard.

The Appellate Court of Illinois(Fifth District) upheld the denial of a building permit by the City of Collinsville for the reason that the application was in violation

of various sections of the BOCA Building Code adopted by the City of Collinsville. None of those reasons were included in the Mayor's original denial of a building permit by his letter of March 23, 1981.

All of the alleged BOCA defects surfaced after the mayor had instructed the building commissioner, Mr. Heinecke, to deny the permit and "bury" it in a drawer. The decision was made to deny and reject the application prior to discovery of any alleged BOCA defects. The alleged BOCA violations were only discovered by Mr. Heinecke as he prepared for the hearing on review after the denial of the application by the Mayor. (App. 34).

There is no testimony on the record to indicate that either the plaintiff or any of its agents were ever told that the second application and plans did not fully comply with the BOCA Code until the motion was made

to uphold the decision of the mayor to deny the application after the hearing before the City Council. The architect was not told. (App. 40). In fact, the architect testified that the application was in compliance. (App. 40). No one at any time asked him any questions or communicated with him in any way concerning any alleged non-compliance of the application.

Further, Mr. Heinecke, the Building Commissioner, never reviewed any of these objections with the Petitioner or any of Petitioner's agents, (App. 34-35). The only inquiry after the second application was to determine who in fact owned Archview (App. 44-45). Mr. Heinecke stated that the list of alleged violations was made up after the denial by the Mayor, but before the hearing on appeal, because they " . . . knew it was going to go to court . . . . " (App. 35). The list

of alleged violations were prepared immediately before the appeal hearing with the City Council. (App. 35).

Prior to taking the permit application to the Mayor, the building inspector, Mr. Heinecke, did not see any violations or defects. (App. 36). Further, he did not point out any violation or defect in the permit application to the mayor prior to the rejection of the building permit application. (App. 36). Mr. Heinecke stated that the only information that he could have given the architect, or anyone else from Archview, concerning the reason for denial immediately after the Mayor's rejection of the application was the Mayor had simply said "NO". (App. 36).

There were no other reasons given or known. Even the Mayor admits that violation of the BOCA Code was not the reason for turning down the building permit. (App. 42-

43). The Mayor had not even looked at the plans attached to the application prior to the appeal hearing. (App. 43). The Mayor testified that he only reviewed BOCA to find violations immediately prior to the appeal hearing. (App. 43-44).

It is inconceivable that the Mayor and the City of Collinsville could be allowed to fashion, at the time of the appeal hearing, a new rationale for the denial of a building permit. The plaintiff had no notice that the application had been denied on the basis of any alleged BOCA defects in the permit. This act denies this Petitioner due process by denying the right and the opportunity to prepare a defense prior to the appeal hearing and should act as the basis for liability of the Mayor and the other Respondents under Section 1983.

3. ADMINISTRATIVE REVIEW BY A REVIEWING BODY IS NOT TO

BE A HEARING DE NOVO

It is also important for this Honorable Court to understand the appellate process and the building permit application system. An appeal to the City Council of the denial of a building permit as stated in this petition is not a hearing de novo. It is axiomatic that the role of a reviewing body on administrative review is limited to a determination of whether the agency's decision is contrary to the manifest weight of the evidence. City of Rockford v. County of Winnebago, 134 Ill.Dec. 246, 253, 542 N.E.2d 423, 186 Ill App 3d 303, (2nd Dist. 1989) Accordingly, no new evidence is to be introduced. The only question is whether or not the denial of the application by the issuing official, in this case, the mayor, was supported by the manifest weight of the evidence. As the alleged building code violations were not a basis for the original

denial, such allegations cannot then be raised at the appeal and cannot be relied upon by the City of Collinsville or this Honorable Court in upholding the denial of the building application.

4. LOWER COURT DECISION BASED ON FACTUAL INACCURACIES

Key to the decision of the Illinois Supreme Court and the Appellate Court of Illinois(Fifth District) in this matter appears to be certain facts which are cited in the opinion of the Appellate Court of Illinois(Fifth District) in support of its decision to affirm the decision of the Circuit Court of Madison County, Illinois. However, it must be pointed out to this Honorable Court that some of the key facts have been misapprehended or misconstrued from the record.

The Appellate Court of Illinois(Fifth District)'s opinion as to the reasons for the

denial are inaccurate. According to the Appellate Court of Illinois(Fifth District), the first reason for denial was that "the city was unable to discover pertinent information missing from the face of the application." (App. 9). The Mayor's letter of March 23, 1981 does not state that the city was unable to discover pertinent information and does not state that any information was "missing" from the face of the application. (App. 9).

The Appellate Court of Illinois(Fifth District)'s conclusion that the city was unable to discover "pertinent" information "missing" from the face of the application is an interpretation that this Court cannot make from the body of this letter. In fact, the testimony is clear that the only inquiry made by the city after the second application was an inquiry as to who owned Archview Investment, Inc. (App. 44-45). This

information was provided to the City when Dr. Escobedo made it quite clear that he was the beneficial owner of the corporation.

The Appellate Court of Illinois(Fifth District) also misapprehends the facts where it says in its opinion that Dr. Escobedo repeatedly refused to supply defendants with the missing information. (App. 19-20). There is no evidence in the record that Dr. Escobedo was ever asked anything pertaining to any "missing" information. In fact, the only inquiry made as pointed out above was an inquiry as to the ownership of Archview Investment, Inc. (App. 44-45). There were inquiries following the first application, but the record before the Court is devoid of any evidence of any other inquiry following the second application.

Finally, the Appellate Court of Illinois(Fifth District) mis-states the facts

and the pleadings in this case where it states that ". . . plaintiff does not deny that its application failed to comply with BOCA Provisions 111.2 through 111.7." (App. 18). This plaintiff does deny that its application failed to comply and introduced ample evidence and testimony that the permit application did comply.

As to BOCA Section 111.2, Mr. Heinecke testified that it is common practice in Collinsville that fees are not paid until a permit is issued and that every application from January 1, 1980 to April, 1988 shows a paid receipt stamped after the date of application. (App. 37). Custom and usage particularly concerning the interpretations of rules and regulations of administrative bodies may be binding upon such administrative bodies. Holland vs. Quinn, 67 Ill. App. 3d 571, 385 N.E. 2d 92 at 94, (1st Dist. 1978).

Given the long standing practice of the City of Collinsville in the enforcement of Section 111.2, it can not now come in and change the rules for this applicant. To do so would be arbitrary and capricious, and proves one of the points which the plaintiff is seeking to establish in this litigation.

The Appellate Court of Illinois(Fifth District)further found that there was a violation of BOCA Code 111.3 in that the permit application, signed by the architect, was not accompanied by a verified Affidavit of the owner that the person making the application of the proposed work had authority to do so. However, the evidence is clear that there were no such Affidavits on corporate applications or any other applications issued and filed with the city between January 1, 1980 and April of 1988. This applicant was in as much compliance as every other applicant

who had worked on this process.

Also, Archview was not in violation of Section 111.4 or Section 111.5 for failing to adequately describe the use and occupancy of the building or the work to be performed in the application. Mr. Heinecke testified that he has received other applications without a complete building plan including those showing those "always issued permits," (App. 30). There was no greater or more detailed description of the use or the work to be performed in any of the applications from January 1, 1980 to April of 1988 and the City of Collinsville has never required any greater description from other applicants (App. 31).

Section 111.6 requires that there be a site plan. The only possible violation disputed in the evidence was a lack of side and front set-backs. Mr. Heinecke admitted that the front and side set backs could easily

be calculated since the drawings were to scale and the boundaries of the property were on the drawings. Indeed, he admitted that he had, in fact, calculated them. (App. 32).

The allegations allegedly supporting a violation of 111.7 are that the plans and specifications do not show designs or calculations for steel beams, joist and bearing exterior walls. Section 111.7 is permissive in nature and states that the building official may require adequate detail. Here Heinecke admitted that he never requested any engineering details. (App. 33-34). Accordingly, the plaintiff should not be faulted for non-compliance with a request which was never made by the only official who could make the request.

The Appellate Court of Illinois(Fifth District) also finds that Archview failed to comply with the BOCA Code and says that

Petitioner agrees with that contention. There is neither a concession nor an assertion in Petitioner's brief to support such an assertion. Also, it is clear that the city did not request any further information from the owner or the architect after the second application. In fact, the undisputed evidence is that the mayor told Mr. Heinecke to bury the application before the existence or non-existence of any deficiency under the BOCA Code was even considered. As this was not a basis for denying the permit initially by the issuing official, the mayor, it may not now be considered by this Honorable Court or any other body in determining whether or not the denial was arbitrary or capricious.

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant Certiorari in order to ascertain an important question of federal law as to whether a

Municipal Corporation and its Individual Officials can deprive someone of its Constitutional Rights in violation of 42 U.S.C.A. § 1983 when an expressed aversion to abortion is a factor in denying someone a right to a building permit and the primary reasoning in denying someone a right to a building permit was noncompliance with the Building Officials Conference of America Code(BOCA) Requirements even though there was no evidence to support the primary reasoning for denial of a building permit at a subsequent review hearing. Further, this Honorable Court should also grant Certiorari to ascertain whether a Municipal Corporation and its Individual Officials deprived someone of its "Due Process" by not apprising or making someone aware of prior to a subsequent review hearing the initial supporting reasons for denial of a building permit. Lastly, this

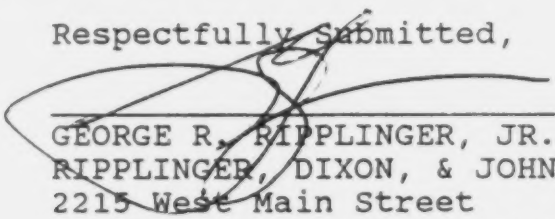
Honorable Court should grant Certiorari to ensure that the proper standard of review is applied to this matter.

CONCLUSION

The Petitioner in this matter contests the manner in which a Municipal Corporation and its Individual Officials dealt with their application for a building permit. Namely, violations of 42 U.S.C.A. §1983, due process, and improper procedures in administrative proceedings have been inflicted on Petitioner by Respondents. This Honorable Court can not allow the Respondents to take the Constitution of the United States in their own hands to sculpt, mold, fashion, and manipulate it according to what it perceives it to be. To allow that would give the Respondents the ability to be "above" the Constitution and would thus render the Constitution as meaningless when applied to anyone else.

WHEREFORE, for the above and foregoing reasons, Petitioner respectfully prays that this Honorable Court issue its Writ of Certiorari to the Illinois Supreme Court.

Respectfully Submitted,



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APPENDIX A

App. 1

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
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June 3, 1992

Mr. George R. Ripplinger, Jr.
Ripplinger, Dixon & Johnston
2215 West Main Street
Belleville, IL 62223

No. 73296 - Archview Investments, Inc., etc., petitioner, v. City of Collinsville, etc., et al., respondents.
Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 25, 1992.

APPENDIX B

App. 2

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Docket No. 5-89-0530

(Decided December 12, 1991; Rehearing Denied January 21, 1992)

ARCHVIEW INVESTMENTS, INC., an Illinois corporation,	) Appeal from the Third Judicial Circuit,
Plaintiff-Appellant,	) Madison County, Illinois
vs.	)
CITY OF COLLINSVILLE, ILLINOIS, a Municipal Corporation; THE HONORABLE GENE J. BROMBOLICH, Mayor of the City of Collinsville; MELVIN HEINECKE, Zoning Administrator of the City of Collinsville; ROBERT L. DESPAIN, WILLIAM F. GIGLOTTO, GARY KLEIN, MELVIN P. PAMATOT, Collectively Councilmen Comprising the City Council of the City of Collinsville, Illinois,	) No. 81-MR-222) Honorable Lola Maddox, Judge Presiding
Defendants-Appellees.	)

Unsuccessful applicant for building

permit filed action against city officials alleging violation of constitutional rights under federal civil rights provision and seeking writ of mandamus to compel issuance of building permit. The Circuit Court, Madison County, Lola Maddox, J., granted judgment for city and city officials, and applicant appealed. The Appellate Court, Goldenhersh, P.J., held that: (1) building permit application's failure to supply information required under city building code, when combined with refusal to supply missing information, were adequate reasons to decline to issue permit; (2) question of whether denial was in part based on city council members' consideration of abortion issue was not necessary to decision and would not be addressed; and (3) mandamus could not be granted absent showing of clear unambiguous right to requested relief.

Affirmed.

William A. Mueller, Ripplinger & Dixon, Belleville, IL, for **Archview Investments, Inc.**

Thomas Lay Burroughs, Draheim & Pranschke, and Kathleen L. Pine, Shepherd, Phoenix & von Gontard, P.C., St. Louis, MO, for **Robert L. Despain**.

G. Edward Moorman, Williamson, Webster, Groshong, Moorman & Falb, Alton, IL, for **Defendants-Appellees**.

PRESIDING JUSTICE GOLDENHERSH delivered the opinion of the court:

Plaintiff, Archview Investments, Inc., appeals from a judgment of the Circuit Court of Madison County in favor of defendants, City of Collinsville, Mayor Gene J. Brombolich, City Clerk Louis Jackstadt, Zoning Administrator Melvin Heinecke, and City Council members Robert L. DesPain, William F. Giglotto, Gary Klein, and Melvin P. Pamatot,

entered after a bench trial, finding that plaintiff's building permit application was properly denied.

In this appeal, plaintiff contends: (1) that defendants' actions deprived it of constitutional right in violation of section 1983 of the United States Code (42 U.S.C. §1983 (1979)), (2) that defendants, City Council members, should not have been granted qualified immunity by the circuit court, (3) that the administrative decision of the City Council is against the manifest weight of the evidence, and (4) that the trial court erred in not issuing a writ of mandamus to compel issuance of the building permit. We affirm.

On October 21, 1980, Dr. Bolivar Escobedo, an obstetrician/gynecologist licensed to practice in Missouri, filed an application for a permit to build an office building on a parcel of land he owned in

Collinsville. He filed the application with the proper authorities in the City of Collinsville (City). Although the application was completed by Dr. Escobedo's architect, Thomas Hall, Dr. Escobedo was listed as the owner of the proposed building, described on the application as an "office building for doctor, with a rental space for more doctors."

City Zoning Administrator Melvin Heinecke testified that upon receipt of the application, he presented it to Mayor Gene J. Brombolich (Mayor) for review, and the Mayor instructed Heinecke to "bury it." Heinecke further testified that there was no discussion between himself and the Mayor at that time regarding any deficiencies in Dr. Escobedo's application. Shortly thereafter, the Mayor, who also serves as Police Commissioner, requested a police investigation of Dr. Escobedo's background. A memorandum dated

November 6, 1980, to Police Commander Nick Mamino from Detective John Swindle revealed that Dr. Escobedo performed abortions as part of his medical practice in St. Louis County, Missouri. The memo further stated that Dr. Escobedo's St. Louis County office had attracted antiabortion protesters and police intervention was occasionally necessary. Also included was the indication by a St. Louis police officer that neither Dr. Escobedo nor his associated had ever deliberately created any problems. No further action was taken on Dr. Escobedo's application, and none was requested.

On January 28, 1981, articles of incorporation of the plaintiff corporation were filed with the Illinois Secretary of State. On March 10, 1981, the City received another application for a permit to build a "multi-tenant office building" at the same

location indicated by Dr. Escobedo's application of October 21, 1980. The March 10, 1981, application was also prepared by Thomas Hall, but plaintiff corporation was listed as the owner. The specifications and floor plans were similar to the documents submitted with the October 21, 1980, application, and Zoning Administrator Heinecke once again brought the application to the Mayor's attention. The Mayor initiated a second investigation by Detective Swindle regarding the application submitted by plaintiff. The results of that investigation were sent in a memorandum dated March 13, 1981, from Detective Swindle directly to the Mayor. Based on the contents of the memo, it appears that the Mayor was attempting to ascertain whether Dr. Escobedo was associated with plaintiff. Detective Swindle reported that after contacting numerous individuals, he

was unable to determine anything other than the identities of the incorporator and the registered agent, neither of whom was Dr. Escobedo. According to the report, Thomas Hall was contacted but refused to disclose Dr. Escobedo's affiliation with plaintiff corporation, if any. Hall referred the detective to Buddy Cooper, an attorney for plaintiff, who claimed he could not divulge any information without conferring with his client. Only after numerous inquiries was the City able to determine that Dr. Escobedo was the sole shareholder of plaintiff.

On March 23, 1981, the Mayor sent Dr. Escobedo a letter denying the building permit. Cited as reasons for denial were the following: (1) the City was unable to discover pertinent information missing from the face of the application, and (2) that abortion clinics are contrary to the general

health, safety and welfare of the public.

Fourteen days after receiving the Mayor's letter, plaintiff filed an appeal of the Mayor's decision with the Zoning Board of Appeals (Zoning Board). Plaintiff was then advised by the City's corporation counsel, Dwight Taylor, that zoning was not at issue, whereby plaintiff transferred his appeal to the City Council. According to the Collinsville Municipal Code (Code), article V, section 501.1, appeals to the Zoning Board must be filed within 15 days of the matter complained of. Conversely, chapter 16, section 16.20.010, of the Code requires that all appeals to the City Council regarding building permit decisions must be filed within five days of the occurrence giving rise to the appeal. There is a dispute among the parties as to the timeliness of plaintiff's appeal to the City Council and whether defendants waived

any time limitations. Plaintiff claims the City's corporation counsel, Dwight Taylor, assured plaintiff's attorney that the City would waive the five-day limitations period and allow plaintiff to transfer its appeal from the Zoning Board to the City Council. Plaintiff entered into evidence a memorandum allegedly dictated by plaintiff's counsel at the time of his conversation with Taylor, noting the waiver agreement. At trial, Taylor denied making such a statement on behalf of the City.

Nevertheless, the City Council, comprised of the Mayor and Commissioners Pamatot, Giglotto, Klein and DesPain, did hear plaintiff's appeal on July 20, 1981. The City Council questioned Dr. Escobedo and Thomas Hall regarding the use of plaintiff's proposed building, the building plans and the timeliness of plaintiff's appeal, but a

transcript of the hearing clearly reveals that the council's paramount concern was whether Dr. Escobedo or any of his associates would be performing abortions in the City. Commissioners Pamatot and Giglotto made statements on the record reflecting their personal aversion to abortion. The hearing culminated in a motion by Commissioner Pamatot to uphold the Mayor's decision to deny plaintiff's building permit on the following grounds:

> "1. Appeal was not filed in compliance with the requirements of Sec. 16.20.010 of the Collinsville Municipal Code,
>
> 2. It is contrary to the general health, safety and welfare of the public in the following respects:
>
> (a) cause traffic problems
>
> (b) cause parking problems
>
> (c) cause crowd control problems

(d) create a public nuisance

(e) is contrary to public policy of this city

3. Applicant failed to comply with requirements of the BOCA Basic Building Code/1981, Sections 111.2; 111.3; 111.4; 111.5; 111.6; and 111.7."

The motion was seconded and unanimously passed by the City Council. Building Officials Conference of America Code (BOCA) provisions 111.2 through 111.7 as adopted by the City are as follows:

"**111.2 Form of application:** The application for a permit shall be submitted in such form as the building official may prescribe and shall be accompanied by the required fee as prescribed in Section 114.0.

111.3 By whom application is made: Application for a permit shall be made by

the owner or lessee of the building or structure, or agent of either, or by the licensed engineer or architect employed in connection with the proposed work. If the application is made by a person other than the owner in fee, it shall be accompanied by a duly verified affidavit of the owner or the qualified person making the application that the proposed work is authorized by the owner in fee and that the applicant is authorized to make such application. The full names and addresses of the owner, lessee, applicant, and of the responsible officers, if the owner or lessee is a corporate body, shall be stated in the application.

111.4 Description of work: The application shall contain a general description of the proposed work, its

location, the use and occupancy of all parts of the building or structure and of all portions of the site or lot not covered by the building or structure, and such additional information as may be required by the building official.

111.5 Plans and specifications: The application for the permit shall be accompanied by not less than two copies of specifications and of plans drawn to scale, with sufficient clarity and detail dimensions to show the nature and character of the work to be performed. When quality of materials is essential for conformity to this code, specific information shall be give to establish such quality; and this code shall not be cited, or the term 'legal' or its equivalent be used, as a substitute for specific information. The building

official may waive the requirement for filing plans when the work involved is of a minor nature.

111.6 Site plan: There shall also be a site plan showing to scale the size and location of all the new construction and all existing structures on the site, distances from lot lines, the established street grades and the proposed finished grades; and it shall be drawn in accordance with an accurate boundary line survey. In the case of demolition, the plot plan shall show all construction to be demolished and the location and size of all existing structures and construction that are to remain on the site or plot.

111.7 Engineering details: The building official may require adequate details of structural, mechanical and electrical

work to be filed, including computations, stress diagrams and other essential technical data. All engineering plans and computations shall bear the signature of the engineer or architect responsible for the design. Plans for buildings more than two stories in height shall indicate where penetrations will be made for electrical, mechanical, plumbing and communications conduits, pipes and systems and the materials and methods for maintaining the required structural integrity, fire resistance rating and firestopping."

We first turn to plaintiff's contention that the administrative decision of the City Council denying plaintiff's building permit is against the manifest weight of the evidence. It is undisputed that findings and conclusions of an administrative body on questions of fact

are held to be prima facie true and correct. Only if the findings are against the manifest weight of the evidence can they be set aside. (Fadler v. Illinois State Board of Education (1987), 153 Ill. App. 3d 1024, 1026, 506 N.E. 2d 640, 642.) A finding cannot be adjudged against the manifest weight of the evidence unless an opposite conclusion is clearly evidenced from the record. Rolando v. School Directors of District No. 125 (1976), 44 Ill. App. 3d 658, 661, 358 N.E. 2d 945, 947.

Upon an examination of the record, we cannot determine that the City Council's decision to deny plaintiff's building permit for lack of information was against the manifest weight of the evidence. In fact, plaintiff does not deny that its application failed to comply with BOCA provisions 111.2 through 111.7. The trial court held, and we agree, that plaintiff's application failed to

meet the requirements of the BOCA provisions as follows: (1) it failed to include a filing fee as required by section 111.2; (2) it failed to include the names and addresses of the officers of plaintiff corporation as required under section 111.3; (3) it failed to contain an adequate description of the use and occupancy of all parts of the building, as required by section 111.4; (4) it failed to include specifications and plans with sufficient clarity and detailed dimensions to show the nature and character of work to be performed, as required by section 111.5; (5) it failed to include a site plan scaled to show boundary lines and distances from lot lines, in violation of section 111.6; and (6) it failed to contain adequate plans for electrical, ventilation and plumbing systems in violation of section 111.7.

These violations, in addition to Dr.

Escobedo's repeated refusals to supply defendants with the missing information, were adequate reasons for defendants to decline issuance of the permit. Plaintiff claims that its noncompliance with the provisions was not the true reason its permit was denied, and that defendants refused to issue the permit solely or primarily because of an aversion to abortion. We have no doubt that several or perhaps all City Council members considered the abortion issue in deciding to deny plaintiff's application, and had plaintiff's application complied with all city ordinances, we would now be compelled to address the constitutional implications of defendants' actions. Plaintiff's application did not comply, however, so we need not address defendants' consideration of the abortion issue in their decision-making. As stated by our supreme court on numerous occasions,

constitutional questions will not be considered unless necessary to the disposition of the case. (Davis v. City of Chicago (1974), 59 Ill. 2d 439, 322 N.E. 2d 29; People v. Fleming (1971), 50 Ill. 2d 141, 277 N.E. 2d 872; see Ashwander v. Tennessee Valley Authority (1936), 297 U.S. 288, 80 L. Ed. 688, 56 S. Ct. 466 (Brandeis, J., concurring).) The constitutional issue in this instance is presented under section 1983 of the United States Code (42 U.S.C. §1983 (1979)). Questions specifically based on section 1983 need not be addressed unless necessary to the disposition of the case. (Cochenour v. Cochenour (8th Cir. 1989), 888 F. 2d 1244; Espino v. Besteiro (5th Cir. 1983), 708 F. 2d 1002.) As we have determined that the evidence supports defendants' actions of denying plaintiff's permit based on ordinance violations, we find it unnecessary to address

the constitutional issues plaintiff presents. We also need not address defendants' argument that plaintiff's appeal to the City Council was untimely, but instead we hold that defendants waived any time limitations by conducting the appeals hearing of July 20, 1981. Since the evidence supports defendants' decision to deny the permit based on BOCA violations, we affirm the trial court's decision in favor of all defendants based on this issue.

Finally, we uphold the trial court's decision not to issue a writ of mandamus to compel issuance of the building permit. In order to be entitled to a writ of mandamus, plaintiff must show a clear, unambiguous right to what is requested and that official action refusing what is requested is devoid of support. Anything less than strict and complete compliance with all necessary and

applicable provisions for building permits must result in a denial of a writ of mandamus. (People ex rel. Wordell v. City of Chicago (1978), 67 Ill. App. 3d 321, 326, 384 N.E. 2d 894, 898.) In this case, as we stated earlier, plaintiff's application was not in strict and complete compliance with all applicable provisions, in that it failed to comply with BOCA provisions 111.2 through 111.7. Therefore, the trial court properly denied plaintiff's request for a writ of mandamus to compel issuance of the building permit.

For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed.

Affirmed.

LEWIS and HOWERTON, JJ., concur.

APPENDIX C

App. 24

Portions of the Non-Jury Trial Court Transcript Proceedings for the Circuit Court of Madison County, Illinois (4/18/88-4/20/88)

Portions of Melvin Heinecke's Testimony reads as follows:
(Tr. 131-173)

***

"Q. What do you do?

"A. I'm building inspector for the City of Collinsville.

"Q. As building inspector do you have any job titles or is that the sole job title?

"A. That's the sole job title, but I'm also a zoning administrator.

"Q. Okay. And how long have you held both of these positions?

"A. Building inspector around ten years; zoning administrator about nine.

"Q. So in 1980 and 1981 you were holding both of these positions?

"A. Right.

***

"Q. Now, after that was submitted you determined that this building was being built in a correct zoning area, did you not?

"A. Yes, sir.

"Q. And you went to see the mayor with it, did you not?

"A. Yes, sir.

***

"Q. When you took it to the mayor as I understand it the mayor told you not to issue that permit, is that correct?

"A. That's right.

"Q. The mayor didn't give you any reasons for that at that time, did he?

"A. No, sir.

"Q. And at that time you didn't give the mayor any reasons for not issuing the permit, is that correct?

"A. I guess I'll have to tell I sure did

because I recognized that drawing. That building was going to be built in Collinsville quite some time ago.

***

"Q. And so when the mayor told you not to issue the permit you took it back and put it in your desk drawer, did you not?

"A. In the cabinet.

"Q. In the cabinet. And you did nothing further with that application?

"A. No, sir.

***

"Q. And again you already knew that for the site that this building complied with the zoning?

"A. Yes, sir.

"Q. So without further ado and any further checking you took it to the mayor, did you not?

"A. Yes, sir.

"Q. And as I recall the discussion you had with the mayor, the mayor asked you why the application was under a different name, isn't that correct?

"A. That's right.

***

"Q. And on this time when you went in to see the mayor you didn't give him any reason for denying the permit, did you?

"A. No, sir.

"Q. And so then you took that and put it back in the cabinet with the first one?

"A. Yes, sir.

"Q. And did nothing further about it?

"A. No, sir.

"Q. And contacted no one?

"A. No, sir.

"Q. Neither the architect, the owner or contractor?

"A. That's right.

***

"Q. Then you call the owner, the architect or the contractor?

"A. Right.

"Q. What do you do when you call them then?

"A. We go over there and give them a copy of what we found and we want them to make the changes. They will send us it back and say we are making the changes.

"Q. And then what happens?

"A. Then they go ahead and we go ahead and issue the permit.

***

"Q. In fact in this discussion the mayor didn't even ask you if it complied with anything, did he, didn't even ask you?

"A. No, sir.

"Q. Nor at this time did he express any defects that he observed in the plans or in

the application?

"A. No, sir.

***

"Q. As you understand there is nothing different about those plans than there would be any other doctors medical building that you have seen during the course?

"A. You are referring to as a doctors office?

"Q. Yes, sir.

"A. No, sir.

"Q. In fact you approved a building permit for a Dr. Rallo?

"A. Yes, sir.

"Q. And was there any major difference between what Dr. Rallo was proposing to do in the way of his plans and building than this one?

"A. No, sir, not that I see.

***

"Q. As a matter of fact isn't it common practice in the City of Collinsville that the fees are not paid until the application is issued?

"A. That's right.

***

"Q. You won't find any in there because the City of Collinsville never requires that, do they?

"A. No.

***

"Q. As a matter of fact you get those kinds of application with great frequency, do you not?

"A. Not too often.

"Q. But you get them, don't you?

"A. We get them.

"Q. And you always issued permits, have you not?

"A. That's right.

"Q. And as far as the description on here it tells you it's going to be?

"A. A multi-tenant office buildi[illegible].

"Q. Right. That's as much of a description as you normally get, is it not?

"A. The first one says office building for doctors?

"A. Right.

"Q. This is the one that was rejected this one, the second one, is that right?

"A. That's the second; that's the first one.

"Q. All right. And you see the same thing in all of these, do you not, no more greater description in any of them, is there?

"A. No.

"Q. You never required any greater description from any of those other applicants, did you?

"A. No, sir.

***

"Q. In fact your mayor told you to bury it before you even figured out that it wasn't there?

"A. That's right.

***

"Q. So by utilizing a scale and a ruler you can tell exactly what the set lines are on the side and back, can you not?

"A. That's where I come up with these here.

"Q. With the scale there?

"A. They are supposed to have it on there.

"Q. But you can tell what it is, can you not?

"A. I can tell, sure.

"Q. In fact you wrote it in there yourself?

"A. That's right.

"Q. So you knew what it was.

"A. That's right. But that's not my job to go around scaling architect's drawings.

"Q. But you did it?

"A. I done that for my own use."

"Q. Okay. They are there for anyone to see, for anyone who can read one of these, is that correct?

"A. That's right. But I would turn it down for because it says 50 foot is the setback.

"Q. But that isn't why you turned it down?

"A. No.

***

"Q. The first sentence which reads, "the building official may require adequate details of structural, mechanical and electrical work to be filed."

"A. Right.

"Q. It doesn't say shell facilities?

"A. It doesn't say shell.

"Q. You never brought that to anyone's attention either, did you?

"A. No, sir.

***

"Q. Now correct me if I'm wrong now, all of these defects we have been talking about and violations of code, those are things you determined after Mayor Brombolich told to you put them in the cabinet, isn't that correct?

"A. Yes, sir.

"Q. Because up until that point you hadn't done anything, the decision was made to turn it down before that was even discovered, isn't that correct?

"A. Yes, sir.

***

"Q. And as far as you know neither you nor anyone else from the City of Collinsville

ever raised any of these objections with either the architect, the owner or the contractor on any of these problems?

"A. As far as I am concerned I never. I seen the architect when he brought them in or he just dropped them off.

***

"Q. Okay. What was your involvement with that?

"A. Well, we knew it was going to go to court so I more or less sat down and made a list in here, looked at the drawings and made a list of what I figured wouldn't meet the codes.

***

"Q. And were you involved in the listing of code violations back at that time?

"A. I probably was before the meeting, that's how they got them, I imagine I was.

***

"THE COURT: In this particular case do you remember looking at the set of plans before you gave the permit to the mayor?

"THE WITNESS: I looked at them myself, yes, ma'am.

"THE COURT: Did you note any defects at the time you looked at it?

"THE WITNESS: No, sir.

***

"THE COURT: You didn't voice any statement to the mayor about any defects?

"THE WITNESS: No, ma'am.

***

"Q. Now, let's say Mr. Hall, the architect in Exhibit 2, would have contacted you right after you talked to the mayor, what could you have told him except that the mayor said not to give him the permit?

"A. That's all I could have told him.

***

"Q. And every application that's been issued from 1980 forward it will show a paid receipt stamped on there subsequent to the date of the application?

"A. Supposed to, yes, sir.

Portion of Gary Apoian's testimony read as follows:

(Tr. 4-5)

***

"A. We had applied for a building permit -- Archview Investments had applied for a building permit with the City of Collinsville. That permit was denied. We processed our appeal of that denial to the Zoning Board of Appeals. I received a telephone call from Mr. Taylor indicating that we improperly filed our appeal before the Zoning Board of Appeals, that this wasn't a zoning matter and that we should withdraw our appeal before that body and instead file before the City Council.

One of my concerns was that there was a five day requirement that had to be met that was jurisdictional. Mr. Taylor indicated that they would waive that five day requirement...

Portions of M. Thomas Hall's testimony reads as follows:

(Tr. 69-72)

***

"Q. And did the building that you designed and the site where it was to be located, are those all in compliance with the zoning ordinance with the City of Collinsville at the time you designed it?

"A. To the best of my knowledge at that time they were.

"Q. In fact did anyone ever tell you that was not?

"A. No, they didn't.

"Q. Were you familiar at the time you

designed this with the building codes of the City of Collinsville?

"A. Yes, I was.

"Q. And what was that building code at that time?

"A. I believe it was the BOCA Code.

"Q. Would you tell us what the BOCA Code is?

"A. The BOCA Code is one of two or three national building codes which communities opt to adopt as their means of enforcement rather than each community writing their own building code.

"Q. And the City of Collinsville had adopted the BOCA Code, is that correct?

"A. I believe so.

"Q. And did you go through the BOCA Code to determine if you plans were in compliance with the BOCA Code that the City of Collinsville had adopted?

"A. Yes, to the best of my ability.

"Q. What was your opinion as to whether or not it was in compliance?

"A. It was my opinion that it was in compliance with the building code at that time.

"Q. At any time has anyone ever told you that it was not in compliance in any respect.

"A. No, they have not.

"Q. Mr. Hall, I'm going to show you what has been previously marked as Plaintiff's Exhibit No. 1 for identification, can you tell us what that document appears to be?

"A. Yes. It's a building permit application.

"Q. And for what?

"A. For a medical office building for Dr. Escobedo.

"Q. And did you prepare take document?

"A. Yes, I did.

"Q. Did you file it with the City of Collinsville?

"A. Yes.

"Q. To your knowledge whatever became of that application, was it approved?

"A. No, I don't know. I have no knowledge of whether it ever was or was not approved.

"Q. You are sure no one ever communicated back to you one way or another?

"A. Not that I recall.

Portions of Gene J. Brombolich's testimony reads as follows:

(Tr. 245-280)

***

"Q. The last sentence you stated that, "if in fact the building is to be used as an abortion clinic it would be contrary to the general health, safety and welfare of public to issue the building permit." You made that

statement, did you not?

"A. Yes, sir.

"Q. Now, there was nothing in that letter pertaining to any particular sections of the BOCA Code, were there?

"A. No, sir, I don't believe so.

"Q. There was nothing in that section pertaining to any sections of the zoning ordinances for the City of Collinsville, was there?

"A. No, sir, I don't believe so.

"Q. There was nothing in that section pertaining to any sections of the zoning ordinances for the City of Collinsville, was there?

"A. No, sir. That was not the reason for that letter.

"Q. Wasn't the reason you turned them down?

"A. No, sir, not at that time.

"Q. Because the violation of that code or violation of the zoning ordinance?

"A. It was in violation for lack of information, sir.

***

"Q. My question was, prior had you actually personally looked at these plans, Exhibit 23?

"A. I didn't hear you ask that question, sir, I'm sorry. Was I familiar with the deficiencies, yes, sir, I was.

"Q. The question, sir, again, did you look at those plans?

"A. No, sir. I don't believe I looked at the plans physically.

***

"Q. At that particular time had there been an examination of the BOCA Code and a list made of any deficiencies or anything of that kind?

"A. No. At that time there had to be discussions, talk, you know, you are in the same office, you know, you have these type of day-to-day conversations...Prior to and after the second application and prior to the appeal process we had more detailed discussions with Mr. Taylor as to specific zoning and specific BOCA Code violations at that time and in preparation for the public hearing and then following the public hearing in preparation for communications back to the applicants.

***

"Q. So with regard to the second application, did you make any efforts to get additional information?

"A. Yes, sir. Again, I asked the Detective Swindle who had been involved in the original investigation as to the applicant, the person of the first application, I asked Detective Swindle if at the time if he would

inquire as to who was Archview Investments and where I could contact the proper officers of that corporation.

APPENDIX D

App. 46

CITY OF COLLINSVILLE
125 SOUTH CENTER STREET
COLLINSVILLE, ILLINOIS 62234
618-344-5252

March 23, 1981

Archview Investment, Inc.
13975 Manchester Road
St. Louis, County, Missouri

RE: Application for Building Permit
by Archview Investment, Inc.

Gentlemen:

The City declines to issue a building permit pursuant to the above application.

Investigation conducted by the City concerning the factual information contained in the application has been met with resistance, which includes lack of knowledge, repeated referrals to other people who have little or no knowledge, outright refusal to answer legitimate inquiry, the use of secretary without financial interest as incorporator, etc.

As Mayor of the City, I feel that it is not in the best interest of the City to issue the permit.

It is my belief, based upon both application and the investigations conducted by the City, that the applicant is attempting

to conceal from the citizens of Collinsville the real use for which the building is intended, and that the applicant is causing an additional financial expense upon the taxpayers of the City by failing to cooperate in the investigations. If in fact the building is to be used for an abortion clinic, it would be contrary to the general health, safety and welfare of the public to issue the building permit.

Yours truly,

CITY OF COLLINSVILLE

Gene J. Brombolich
Mayor